Fletcher has been criticised it seems unobjectionable if reasonableness is considered in determining the dangerous nature of things brought upon the land.[10] This accords with the conclusion reached in a recent case, *Hickey* v. *McCabe & Bihler* (R. I. 1910) 75 Atl. 404, where the plaintiff was allowed to recover for the injury to his property caused by vibration due to blasting on neighboring premises, although he showed no invasion of his premises by stones or dirt, or negligence in the conduct of the defendant's operations. This result, moreover, exposes the fallacy of the doctrine of consequential injury underlying the decision in *Booth* v. *Rome etc. Ry. Co.* If "consequential" is made synonymous with "non-actionable" its use is nominal and so begs the question for it obviously affords no test of a cause of action. On the other hand, if indirect injury is meant an action lies,[11] and the term consequently merely indicates that the action must be in Case rather than Trespass.

The rule of *Booth* v. *Rome etc. Ry. Co.* is open to further attack because of its disregard of the similarity between the injury caused by vibration and that caused by the removal of the support of land, by an adjacent owner. True, the right of support, lateral or subjacent, has thus far been held violated only where there has been a displacement of soil caused by a removal of land immediately adjoining.[12] Since, however, recovery is founded upon the natural right of an owner to have his land in its natural state supported by that of his neighbor, the displacement of soil by blasting, though accomplished in a slightly different manner and by somewhat unusual means, would nevertheless seem as much a disturbance of this right as the injury resulting from the actual removal of supporting earth. It is notable, too, that the disturbance of land, without actual invasion, by the removal of lateral support has been deemed a trespass, although the cases do not indicate clearly whether Trespass or Case is the appropriate remedy.[13]

DIVESTMENT OF PARTNERSHIP FIRM TITLE.—There resides in the partners of a going concern an undoubted right to divest firm title by ordinary business transactions,[1] or to assume and convert into firm debts the individual liabilities of a separate partner,[2] and a single partner can accomplish the same result by disposing of his interest in the business, to one or more of his co-partners or to a stranger, provided all the partners assent.[3] Because, however, of a rule of administration, developed in equity, and adopted in insolvency and bankruptcy proceedings, that partnership creditors shall be preferred in the distribution of firm assets, and separate creditors in separate assets, transfers of firm title effected on the eve of a situation calling for

[10]Bradford *v.* St. Mary's etc. Co. *supra.*

[11]Eaton *v.* B. C. & M. R. R. Co. (1872) 51 N. H. 504; *cf.* Wheeler *v.* Norton (N. Y. 1904) 92 App. Div. 368, and comment on the latter case in Derrick *v.* Kelly (1910) 120 N. Y. Supp. 966.

[12]Washburn, Real Property (6th ed.) §§ 1296, 1298.

[13]2 Dane, Abridgment 717; Mamer *v.* Lussen (1872) 65 Ill. 484; Buskirk *v.* Strickland (1882) 47 Mich 389.

[1]Mabbett *v.* White (1855) 12 N. Y. 442.

[2]Nordlinger *v.* Anderson (1890) 123 N. Y. 544; Meyers *v.* Tyson (1896) 2 Kan. App. 464.

[3]Bolton *v.* Pullen (1796) 1 Bos. & P. 539.

the application of this rule for marshalling assets, since they would deprive the creditor of a great part of his security, are void if made in bad faith.[4] The exact basis of a firm creditor's right to impeach such a transaction is not altogether clear. One jurisdiction gives him a legal right independent of partners' liens to be paid from the firm assets, a view which tends toward the conception of a firm as a distinct entity. So any transfer of firm property to an individual[5] or the assumption of a separate debt by the firm,[6] while insolvent, or on the eve of insolvency, is void. In fact, under this theory a firm should apparently possess no greater freedom in dealing with its assets to the prejudice of its creditors than is accorded an individual. This doctrine, however, is but little recognized, and it is generally held that the firm creditor's right is derived only from the lien which each partner has to have the partnership property applied to firm debts, to which right the firm creditor is subrogated.[7] It continues to the partner only so long as he can assert his equity, but vanishes when the partners have *bona fide* waived their liens. The *bona fides* of the transaction is determined by the actual state of mind of the transferer and transferee[8] or, in some jurisdictions, that of the transferee alone,[9] irrespective of the question of insolvency.[10] However, the transfer must be executed and not merely executory[11] or contingent,[12] and of course firm creditors are not prejudiced if an express reservation of a single partner's lien accompanies a transfer of firm title.[13] Moreover, there is a conflict whether the burden of showing the bad faith in a given case, is on the transferee or the party complaining.[14] Further, some courts save harmless such creditors by implying a reservation, freely indulging presumptions to that end; presumptions easily raised in the absence of consideration for the transfer.[15]

To the derivative nature of the firm creditor's right it is objected that a partner's interest is in the surplus after the payment of firm debts only and that, therefore, the creditor has a right which becomes absolute on insolvency, to be paid from such funds. This changes the test of *bona fides* from the state of mind of the partner, to what can injure the right of the creditor, and a transfer without valuable con-

[4] *In re* Byrne (1868) Fed. Cas. No. 2270; Collins *v.* Hood (1846) Fed. Cas. No. 3015.

[5] Tenney *v.* Johnson (1861) 43 N. H. 144.

[6] Ferson *v.* Monroe (1850) 21 N. H. 462.

[7] *Ex parte* Ruffin (1801) 6 Ves. 119; Fitzpatrick *v.* Flannigan (1882) 106 U. S. 648; Huiskamp *v.* Moline Wagon Co. (1886) 121 U. S. 310; Sargant *v.* Blake (1908) 160 Fed. 57; Bedford *v.* McDonald (1899) 102 Tenn. 358.

[8] Howe *v.* Lawrence (Mass. 1852) 9 Cush. 553; Purple *v.* Farrington (1881) 119 Ind. 164; Sargant *v.* Blake *supra.*

[9] Meyers *v.* Tyson *supra.*

[10] Goddard-Peck Co. *v.* McCune (1894) 112 Mo. 426.

[11] *In re* Kemptner (1896) L. R. 8 Eq. 286.

[12] Fitzpatrick *v.* Christi (1869) 20 N. J. Eq. 90.

[13] Olson *v.* Morrison (1874) 29 Mich. 395; Bulger *v.* Rosa (1890) 119 N. Y. 459; Mansur-Tebbetts Co. *v.* Brunton (1900) 159 Mo. 213.

[14] Bonwit *v.* Heyman (1895) 43 Neb. 537; Nordlinger *v.* Anderson *supra.*

[15] Thayer *v.* Humphrey (1895) 91 Wis. 276.

sideration during or on the eve of insolvency, is fraudulent.[16] This doctrine, representative of the great weight of authority, has recently been approved in a federal court, *In re Terens* (E. D. Wis. 1910) 175 Fed. 495, where it was held that a transfer by one partner of his interest in a firm of two, to his co-partner who assumed the firm debts, when the partnership and the individual partners were insolvent, was fraudulent, regardless of their actual state of mind.

Obviously a promise by an insolvent, to pay a debt is valueless, and so where one partner transfers his interest in the business to a surviving insolvent partner, on the understanding that he assume the firm debts, no real consideration passes,[17] though some courts hold the moral obligation to be sufficient.[18] Nor, indeed, does the promise impress a lien on the property, but merely a personal liability on the promisor.[19] A transfer by the firm to pay a debt for which neither the firm nor a partner individually is liable is voluntary,[20] but, on the other hand, such a debt assumed during solvency, becomes the debt of the firm and may properly be discharged after insolvency.[21] On a mutual agreement by the partners to use the firm property for the payment of each other's debts, it has been held that the waiver of the right by each partner to have the assets applied to the payment of firm debts, is a sufficient consideration.[22] The better, and more authoritative view, however, is that since the interest of the partners in the firm property is merely the surplus after the debts are paid, such a transfer is a relinquishment of no rights at all,[23] and is, therefore, without consideration and void. It is conceived, moreover, that the recognition of the firm creditors' rights necessarily results in a strict definition of valuable consideration.

THE ADMISSIBILITY OF A TESTATOR'S DECLARATIONS DISCLOSING INTENTION.—Although the declarations of a testator violate the Hearsay Rule if offered as evidence of extrinsic facts, their admissibility as evidence of the testator's mental condition at the moment of utterance, is undoubted. And if the mental condition evidenced is not of a mere temporary character its existence at prior or subsequent moments is a logical inference, unless the interval of time between the moment of declaration and the time at which the mental state is material is so great that the fact of its existence at the latter moment is too conjectural. This depends largely upon the durableness of the particular mental condition. Accordingly, testator's

[16] *Ex parte* Mayou (1865) 4 De G., J. & S. 663; Darby *v.* Gilligan (1889) 33 W. Va. 246; Thayer *v.* Humphrey *supra; In re* Cook (1871) Fed. Cas. No. 3150; *In re* Sauthoff (1877) Fed. Cas. No. 12380; Roof *v.* Herron (1883) 15 Neb. 73; Bannister *v.* Miller (1895) 54 N. J. Eq. 121.

[17] Conroy & O'Connor *v.* Woods (1859) 13 Cal. 626; Darby *v.* Gilligan *supra; Ex parte* Mayou *supra.*

[18] Johnson *v.* Robuck (1898) 104 Ia. 523.

[19] *Ex parte* Ruffin *supra;* Smith *v.* Edwards (Tenn. 1842) 7 Humph. 106.

[20] Wiggins *v.* Blackshear (1894) 86 Tex. 665.

[21] Nordlinger *v.* Anderson *supra;* Teague *v.* Lindsey (1894) 106 Ala. 266, 278.

[22] Wiggins *v.* Blackshear *supra.*

[23] Jackson Bank *v.* Durfey (1895) 72 Miss. 721. This of course applies where the firm is treated as an entity, distinct from its members. Teague *v.* Lindsey *supra.*